Supreme Court, U.S
FILE

Docket No. 01 118 JUL 19 2001

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SUPREME COURT OF THE UNITED STATES

WILLIAM S. BURROUGHS, JR.

Petitioner/Appellant

v.

LABIB JOSEPH CHAMMAS

and

JAMES M. TOWARNICKY

Respondents/ Appellees

On Petition for Writ of Certiorari to the Supreme Court of Virginia

PETITION FOR WRIT OF CERTIORARI

William S. Burroughs, Jr.
Member of the Bar of This Court
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Petitioner/Appellant, pro se

Questions Presented for Review

I. Did the trial court commit reversible error by means of abuses of discretion and/or a violation of Virginia statutes?

II. Should current law be changed, so as to grant a federal constitutional right of appeal under the Due Process Clause of the Fourteenth Amendment, whereby the Supreme Court of Virginia must hear Appellant's appeal, despite the absence of an appeal of right in the instant case under Virginia law?

III. Did the Supreme Court of Virginia deny federal due process in applying existing Virginia law to deny Appellant's petition for appeal?

IV. Did the Supreme Court of Virginia deny federal equal protection of the laws in applying existing Virginia law to deny Appellant's petition for appeal?

Parties

The parties to this case are Appellant William S. Burroughs, Jr., Appellee Labib Joseph Chammas and Appellee James M. Towarnicky. There are no parent companies or nonwholly owned subsidiaries involved in this case.

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Citations of Reports of Opinions and Orders

There are no official or unofficial reports of any of the opinions and orders entered in this case.

Basis for Jurisdiction in This Court

Pursuant to Rule 14.1(e):

(i) The judgment of the Supreme Court of Virginia denying a petition for appeal, as to which review is sought herein, was entered on March 6, 2001.

(ii) A petition for rehearing to set aside the said order of March 6, 2001, was denied by the Supreme Court of Virginia by its order of April 20, 2001.

(iv) This Court has jurisdiction to review on a writ of certiorari the judgment in question under 28 U.S.C. Section 1257. Appendix, p. 18.

(v) The notification required by Rule 29.4(c) has been made to the Attorney General of Virginia, and 28 U.S.C. Section 2403(b) may apply in this case.

Constitutional Provisions and Statutes Involved in this Case

The following are set forth verbatim in the appendix:

Fourteenth Amendment to
Constitution of the United States, Section 1
United States Code: Title 28, Section 1257
Code of Virginia: Sections 8.01-271.1, 8.01-364, 8.01-383, 8.01-383.1, 8.01-670, 17.01-405, and 54.1-3908.

The Nature of the Case and the Material Proceedings in the State Courts

Appellant William S. Burroughs, Jr., (Burroughs) represented Appellee Labib Joseph Chammas (Chammas) in the case of *Chammas v. Thai* in the Circuit Court of Arlington County, Virginia (the Thai case), as substitute counsel, pursuant to a written fee agreement. The defendants therein were represented by Appellee James M. Towarnicky (Towarnicky). The *Thai* case was settled in February, 1998, as the result of which Towarnicky held $52,000 in settlement proceeds, that were to be disbursed to Chammas for his proceeds and to Burroughs for his fee and expenses. However, Chammas objected to the disbursement, due to a controversy over Burroughs' fee. Burroughs attempted to settle the fee dispute, without success, and then filed an attorney's lien. Due to the unresolved fee dispute, in June, 1998, Towarnicky filed an interpleader action against Chammas and Burroughs. However, contrary to the statute, Towarnicky retained the fund, rather than paying it to the clerk.

Chammas retained new counsel, and Chammas' claim was filed against the interpled fund, stating that Burroughs was owed less than the fee he was claiming. Chammas also filed a cross-bill against Burroughs for legal malpractice. Burroughs filed a claim against the interpled fund for his fee.

In September, 1998, Towarnicky offered to withdraw as plaintiff in the interpleader case with a fee of $2,000. Chammas and Burroughs agreed, with determination of who was to be assessed for Towarnicky's fee to depend on the outcome of the interpleader case. However, Burroughs requested a fee statement from Towarnicky, but Towarnicky refused to furnish one and the proposal languished.

In March, 1999, Towarnicky served deposition notices and interrogatories on Chammas and Burroughs, along with a fee statement in the amount of $9,100, purportedly to learn why Burroughs would not agree to his withdrawal as plaintiff in the interpleader case, and whether there were potential claims against his clients in the *Thai* case. As to any such potential claims, the record is devoid of any suggestion thereof, in light of the settlement of the *Thai* case.

After Towarnicky refused to withdraw the discovery requests unless he was paid the greatly increased fee, Burroughs moved for a protective order as to the discovery requests, and for the discharge of Towarnicky as plaintiff in the interpleader case, with his fee to be determined by the court after the trial. A few minutes before the hearing on these motions, Towarnicky agreed to them.

Shortly after the settlement of the Thai case, in March, 1998, Chammas had filed a complaint against Burroughs with the Virginia State Bar, which was summarily dismissed. Burroughs filed a libel action against Chammas to recover the cost of his responding to the bar complaint, alleging that the complaint was false and misleading and had been filed with malice, i.e., that it was not privileged. The interpleader and libel cases were consolidated for trial, by agreement.

In the course of the pre-trial proceedings, Judge William T. Newman, Jr., ruled *in limine* that the pleadings Burroughs filed on behalf of Chammas in the Thai case were not frivolous; and that Burroughs' fee was to be determined by *quantum meruit*, rather than by the fee agreement. Chammas opposed the first ruling, but concurred with respect to *quantum meruit*, seeking to have the fee reduced to less than the contract amount.

The consolidated cases were tried to a jury before Judge Newman on November 1 and 3-4, 1999. Towarnicky appeared *pro se* and requested that evidence concerning his fee be heard by the jury. This request was denied, in that it was contrary to the agreed resolution of the motions for a protective order and discharge, in that the court was to determine Towarnicky's fee after the trial. The jury found in favor of Burroughs for all of the compensatory damages he sought in each case, and found in favor of Burroughs on Chammas' cross-bill.

Chammas filed post-trial motions, and Judge Newman set aside the $4,160 verdict in the libel case, finding that there was no proof of common-law malice independent of the occasion on which the communication was made, as required by Virginia law. Also, by remittitur, the trial court reduced the jury's $23,374.79 verdict for Burroughs' *quantum meruit* fee and expenses in the interpleader case to $17,333.33, which corresponded to the contract amount for the fee alone.

Concurrently with Chammas' post-trial motions, Towarnicky applied for his fee and costs as plaintiff in the interpleader case, submitting a statement for $11,350 and a request for an additional $2,025 for work done after his discharge, for a total of $13,375. In response, Chammas did not object to the amount sought and agreed to pay the first $2,000 of the $13,375. Burroughs objected to the amount sought and to any portion being assessed against his share of the fund. In January, 2000, Judge Newman awarded Towarnicky the unitemized amount of $9,150. The first $2,000 was assessed against Chammas, and the balance was assessed equally against Chammas and Burroughs.

Towarnicky filed a motion for reconsideration of the portion of his fee application, which had been denied by Judge Newman, including a request that the basis for the $9,150 award

be itemized. Burroughs objected to any increase in Towarnicky's fee, but joined in the request for itemization. Judge Newman denied any increase in the award, but did agree to itemize the $9,150 fee. Towarnicky was instructed to draft a proposed order, to be reviewed by Burroughs and Chammas' counsel.

Burroughs subsequently moved for reconsideration of the remittitur, the setting aside of the jury verdict and the $9,150 fee award. At the beginning of the hearing on this motion, Towarnicky submitted a proposed memorandum order itemizing the $9,150 fee award and providing for an additional fee to him in the amount of $4,725, for the presentation and defense of his initial fee application, all of which was to be assessed against Burroughs. The order had not been reviewed by the other parties.

The hearing continued and Judge Newman announced that he had not had an opportunity to read Burroughs' motion. Towarnicky and Chammas then made a preliminary motion that Burroughs' motion to reconsider not be heard on its merits. Judge Newman granted this preliminary motion and denied Burroughs' motion to reconsider without a hearing, and without reading the motion.

Towarnicky then asked for sanctions against Burroughs, and Judge Newman announced that he would consider for a second time Towarnicky's motion for reconsideration of the $9,150 fee award, in contemplation of sanctioning Burroughs for having filed his motion to reconsider.

Over Burroughs' written objection, Judge Newman adopted the memorandum order and final order as drafted by Towarnicky, in toto, including the assessment against Burroughs of the $4,725 additional fee, and the final judgment order was entered. Appendix, p. 31, 41.

In Burroughs' amended petition for appeal to the Supreme Court of Virginia, six errors were assigned, each with one question presented, as to whether the trial court (1) abused its discretion in granting the remittitur in the interpleader case; (2) violated Code of Virginia, Sections 8.01-383.1 Appendix, p. 49, in failing to put Burroughs on terms to accept the reduced amount in the interpleader case, as an alternative to a new trial; or, in the alternative, whether the trial court abused its discretion in failing to order a new trial as to damages under Section 8.01-383 Appendix, p. 49; (3) erred in setting aside the verdict in the libel case where there was proof of common-law malice, behavior actuated by motives of personal spite, or ill-will, independent of the occasion on which the communication was made; (4) abused its discretion in awarding the initial fee and costs in the amount of $9,150 to Towarnicky for his service as plaintiff in the interpleader case; (5) abused its discretion in awarding Towarnicky the additional fee of $4,725 in the interpleader case for his defense of the said $9,150 fee initially awarded; (6) abused its discretion in assessing against Burroughs $3,575 of the said initial fee and costs awarded to Towarnicky, plus all of the additional fee of $4,725.

In Virginia there is no right of appeal as to a judgment in a civil case, other than with respect to the limited jurisdiction of the Virginia Court of Appeals concerning domestic matters and workmen's compensation, which limited jurisdiction does not apply in this case or in the majority of civil cases. Virginia Code Section 17.1-405. Appendix, p. 51. Rather, an appellant must petition the Supreme Court of Virginia to grant an appeal. Virginia Code Section 8.01-670. Appendix, p. 50.

Burroughs filed such a petition for appeal, but it was denied by the latter court, with a finding that there was "no reversible error." A petition for rehearing was also denied, and the instant petition ensued. Appendix, pp. 45, 46.

Raising of Federal Questions

Inasmuch as the Supreme Court of Virginia did not carry out the due process and equal protection violations as to which review is sought until it denied Burroughs' petition for appeal, the federal questions raised herein are being raised initially in this Court. This Court has jurisdiction to review the action of the Supreme Court of Virginia under 28 U.S.C. Section 1257. Appendix, p. 18.

The Facts of the Case

The evidence presented at trial and the conduct of the parties related to the fees awarded to Towarnicky are described in the argument below. The essence of the trial evidence is that there was sufficient evidence to support both the jury verdicts and an absence of evidence of unfairness or shocking content in the verdicts. The essence of the conduct relating to the fee awards is that Towarnicky's work following his $2,000 proposal was excessive and unnecessary; and that Burroughs did nothing improper as to the $2,000 proposal or thereafter.

Argument

Remittitur in the Interpleader Case

Chammas contended that he had been denied a full opportunity to present evidence that the pleadings filed by Burroughs on his behalf in the Thai case were frivolous. Chammas did not move for a new trial. In granting the remittitur, Judge Newman commented that Chammas had been limited by the pre-trial ruling that the pleadings were not frivolous; and that Burroughs' efforts on behalf of Chammas did not "stand a snowball's chance."

With respect to any limitation on Chammas' evidence, if Chammas was denied a fair opportunity to present his evidence, it has long been the law that the appropriate remedy is a new trial.

> ... the court will award a new trial where the case has not been properly developed and the court can see that other evidence in fact exists, and that through some misconception of the law applicable to the case, or through some surprise, accident or oversight, justice demands a new trial, and that the party injured be permitted to fully present his case. Michie's Jurisprudence, New Trials, Section 46, citing *Fairfax v. Lewis*, 38 Va. (11 Leigh) 233 (1840).

However, Burroughs contends that Chammas had a fair and full opportunity to present his case. Despite the pre-trial ruling that the pleadings filed by Burroughs were not frivolous, Chammas' counsel presented evidence to the contrary, through the expert testimony of Towarnicky, and argued the point to the jury.

As to the second basis for Judge Newman's ruling, that Burroughs' efforts "did not stand a snowball's chance," a remittitur is to be granted only where the Court makes certain findings, which was not done herein.

> In Virginia, the courts are clothed with the authority, and charged with the duty, to correct what plainly appears to be an unfair verdict in a ... case. The use of this authority is but the exercise of the inherent discretion of the trial courts, limited by the admonitory principle that it is the jury's function, ordinarily, to assess damages. (Citations omitted).
>
> Where the attack upon such a verdict is based upon its alleged excessiveness, if the amount awarded is

> so great as to shock the conscience of the court and to create the impression that the jury has been motivated by passion, corruption or prejudice, or has misconceived or misconstrued the facts or the law, or if the award is so out of proportion to the injuries suffered as to suggest that it is not the product of a fair and impartial decision, the court is empowered, and in fact obligated, to step in and correct the injustice. (Citations omitted). *Edmiston v. Kupsenel*, 205 Va. 198, 202 , 135 S.E.2d 777 (1964).

In considering a remittitur, the trial court must rule not on the basis of how the judge would have voted as a member of the jury, but on the basis of whether there was sufficient credible evidence upon which the jury could have based the verdict.

> But neither ... (a new trial nor a remittitur) is warranted if the verdict merely appears to be large and more than the trial judge would have awarded had he been a member of the jury. If the verdict is supported by sufficient evidence and is reached in a fair and impartial trial, it cannot be disturbed (Citations omitted). *Edmiston*, supra, 205 Va., at 202.

Further, the trial court must adequately explain its imposition of a remittitur, or it will be reversed on appeal and final judgment entered.

> While a trial judge may not arbitrarily substitute his opinion for that of the jury, he has both the power and the duty to correct a verdict which he finds so excessive as to shock the conscience of the court or to compel the conclusion that the verdict was the product of passion or prejudice or some misunderstanding of the facts or the law. When a judge makes such a finding, it is our sole function to determine whether he has abused the

> discretion accorded him by the statutes and the common law. We can make that determination only when the judge states the reasons underlying his decision. If the record on appeal contains no such statement, we will reverse the order of remittitur, reinstate the damage award, and, absent reversible error on the issue of liability, enter final judgment on the verdict. *Hogan v. Carter*, 226 Va. 361, 372, 310 S.E.2d 666 (1983), citing *Bassett Furniture v. McReynolds*, 216 Va. 897, 224 S.E.2d 323 (1976).

The trial judge's statement should include the "factors in evidence relevant to a reasoned evaluation of the damages incurred ..." *Hogan*, supra, 226 Va. at 372. "Reasonableness" is the standard by which the trial judge's evaluation of such factors is to be tested on appeal. *Ford Motor Co. v. Bartholomew*, 224 Va. 421, 297 S.E.2d 675 (1982), citing *Bassett Furniture*, supra.

In each of *Hogan, Bassett Furniture* and *Bartholomew*, the trial judge filed a written statement setting forth in detail the reasons for the remittitur, and the details of the facts relied upon and the reasonableness of the trial judge's analysis are discussed by the court before affirmance, to demonstrate that there was a valid basis for the remittitur. Thus, it is clear that the trial judge's explanation of his or her action is critical to evaluation on appeal. See 226 Va. at 373, 216 Va. at 912-913, and 224 Va. at 435-436. It is also clear that there was no such explanation in this case.

Where the trial judge does not adequately "state the reasons underlying his decision," as per *Hogan*, supra, on appeal the court will "reverse the order of remittitur, reinstate the damage award, and, absent reversible error on the issue of liability, enter final judgment on the verdict." 226 Va., at 372. Notwithstanding, Burroughs' petition for appeal was denied.

Even if there had been an explanation, the trial court's "snowball's chance" comment was unfounded. Burroughs' representation of Chammas had been undertaken on a contingent fee basis, so as to neither the motion to vacate a sanction imposed by Judge Benjamin Kendrick of the Arlington Circuit Court, nor the petition for a writ of prohibition filed in the Supreme Court of Virginia, was there to be any significant increase in the cost to Chammas, and the alternative to filing each of the pleadings in question was to proceed to trial, face a certain loss, and then appeal where no appeal of right would be available. The loss was certain because Judge Kendrick had imposed the sanction of having certain facts taken as true. This loss would have been not only of Chammas' case against the Thai estate, but also of a counterclaim against Chammas. Therefore, inasmuch as there was a significant body of law to support each of the pleadings, Burroughs had an ethical obligation to proceed.

With respect to the motion to vacate, the initial motion by Chammas' prior counsel to reconsider the imposition of the sanction did not include a complete presentation of why Judge Kendrick was in error in imposing the sanction. Judge Kendrick had imposed a sanction, which was not applicable, unless an order for compliance was first issued and disobeyed, which simply did not occur. As to this incorrect imposition of the sanction, no credible theory has ever been presented to support it. Was Burroughs to assume that, even though Judge Kendrick was dead wrong, that a complete presentation of the matter would not change his mind, and that it was fruitless to make the attempt?

As to the petition for a writ of prohibition, on grounds that Judge Kendrick lacked jurisdiction to impose the sanction, there was a significant body of law supporting such a petition, including five opinions of the Supreme Court of Virginia. Was

this a situation where the petition "did not stand a snowball's chance?" Another aspect is that the strategy worked, in that the case settled, in part because of the pendency of the petition.

In considering the remittitur, the issues to be decided by the trial court were (i) whether the jury had sufficient evidence upon which to base its verdict for $23,374.79, (ii) whether the verdict was fair and impartial and not influenced by passion, prejudice or corruption, or misconception of the facts or law, and (iii) whether the verdict was so excessive as to shock the conscience of the court.

As to the sufficiency of the evidence, the cases were tried for three days over a four-day period; the jury heard from six witnesses and received 32 exhibits describing Burroughs' work on behalf of Chammas; Burroughs testified at length concerning each of the actions he took on behalf of Chammas, and was cross-examined at length on such testimony; Burroughs' evidence contained a detailed record of the time expended by Burroughs in the Thai case; the evidence included an explanation of the $23,374.79 fee sought by Burroughs, as well as the $17,333.33 fee which would have been applicable under the contract; and the parties argued to the jury at length on the question of whether Burroughs had earned the fee he was seeking, pursuant to the standards of quantum meruit set forth in the jury instructions.

As to whether the jury was fair and impartial and not improperly influenced, the jury deliberated for a number of hours before arriving at their verdict, and there is absolutely no evidence or even an allegation to indicate that the jury was other than fair and impartial or influenced by anything other than the evidence, arguments and instructions.

As to whether the award of damages was so excessive as to shock the conscience, the amount of the jury's award bore a

reasonable relation to the evidence, i.e., the award was the product of the numbers of hours of Burroughs' work, as shown by his evidence, times his applicable hourly rate.

Therefore, none of the criteria for a remittitur was met in the instant case. Notwithstanding, if the remittitur was to be imposed, the correct procedure was for the trial court to order a new trial, or to put Burroughs on terms to accept the reduced amount or to elect a new trial on the issue of his damages.

> If the verdict is determined to be excessive, the court may put the successful party on terms to accept a reduced amount, deemed reasonable compensation for his injuries, as an alternative to awarding a new trial (Code, Section 8-350) (now 8.01-383), or it may order a new trial as to the whole amount of damages (Code, Section 8-224) (now 8.01-383.1). *Edmiston*, supra, 205 Va., at 202.

This procedure was not followed in the instant case. Rather, judgment was entered for the reduced amount without an election, notwithstanding Burroughs' effort to bring the foregoing controlling authorities to Judge Newman's attention, and to obtain an election and/or a new trial as to damages, by means of his motion to reconsider, for which he was sanctioned.

Setting Aside of Jury's Verdict in the Libel Case

The trial court's basis for setting aside the jury's verdict in the libel case was its finding, stated in the order granting Chammas' subject motion, that "there was no evidence of malice independent of the communication giving rise to the claim of defamation, which evidence was necessary to defeat the qualified privilege of Code of Virginia, Section 54.1-3908." Appendix, p. 52.

In *The Gazette v. Harris*, 229 Va. 1, 325 S.E.2d 713 (1985), the applicable standard is described.

> Virginia does not permit a qualified privilege to be defeated upon a showing of mere negligence. We require proof of common-law malice, behavior actuated by motives of personal spite, or ill-will, independent of the occasion on which the communication was made. *Storey v. Newspapers, Inc.*, 202 Va. 588, 590, 118 S.E.2d 668, 670 (1961). 229 Va., at 18.

Storey states that the required malice may be shown by the "language itself if it is capable of affording evidence of express malice, *or* by extrinsic evidence." (Emphasis added.) 202 Va., at 591.

It is Burroughs' position that there was such extrinsic evidence of malice independent of the occasion on which the bar complaint was filed, i.e., evidence of malice other than the false and misleading statements contained in the bar complaint itself - namely extrinsic evidence, as permitted by *Storey*, supra, of an on-going dispute over Burroughs' fee, as required by *The Gazette*, supra. That is, "behavior actuated by motives of personal spite, or ill-will" - the fee dispute - "independent of the occasion on which the communication was made" - a dispute which occurred before and after the bar complaint. The independence of this fee dispute, from Chammas' point of view, is demonstrated by the lack of any express mention of the same in his complaint to the Virginia State Bar.

Amount of Fee Awarded to Towarnicky

Burroughs contends that the defects in the trial court's memorandum order, drafted by Towarnicky to itemize his fee

award, *inter alia*, demonstrate that the trial court abused its discretion in adopting the memorandum order. The memorandum order relies on Towarnicky's fee statement for $11,350, and in attempting to itemize the lesser amount of $9,150 for the initial fee award, the arithmetic is inaccurate, in that the various components of the award do not total $9,150. Notwithstanding notice of this defect, Judge Newman entered the order.

The fees awarded to Towarnicky were not only excessive, but also unnecessary. In summary, he was awarded a total of $13,875, where the only necessary work was the preparation and filing of a three-page bill of complaint and the payment of the interpled fund to the clerk. And he failed to do the latter. (Had he paid the fund into court for deposit into an interest-bearing account, instead of holding it in a non-interest bearing account, there would have been enough interest earned to pay him an ample fee.)

A critical factor is that Towarnicky's fee request, beyond the initial $2,000 proposal, is based on the fallacy that his work following Burroughs' response to such proposal was required because Burroughs' said response was improper. Such alleged impropriety is also the basis for Chammas' position, which the trial court accepted in large part, that Burroughs should be assessed all of Towarnicky's fee beyond the initial $2,000.

However, there were only two reasons why the $2,000 proposal languished, neither of which involved any improper conduct by Burroughs. The first, and clearly the most significant, was Towarnicky's refusal to provide a statement in support of the $2,000 fee. The second was his insistence that the proposed order restate the release of his clients in the Thai case, which was already set forth in the settlement documents in that case. However, this second reason was mooted when Burroughs

endorsed an order containing the release language. Neither of these reasons can be said to indicate improper conduct on Burroughs' part.

Examples of the excessiveness of the initial fee award, at $225 per hour, are $2,250 for the preparation of the three-page interpleader bill of complaint, which involved simple facts, amptly documented, and a half-page code statute, Virginia Code Section 8.01-364; $1,800 for discovery requests, purportedly made to learn facts Towarnicky already knew; and $2,250 for opposition to the motion for a protective order as to the discovery requests, and the companion motion for his discharge as plaintiff in the interpleader case, with the fee to be determined by the court after the trial. A few minutes before the hearing, Towarnicky agreed to all that Burroughs requested in these motions. The latter $2,250 was awarded to Towarnicky even though these motions had been precipitated by his insistence that he be paid $9,100 without the intervention of the court, before he would withdraw his unnecessary discovery requests.

As to the additional fee for the presentation and defense of the fee application, the authority relied upon by the trial court, *Daly v. Hill*, 790 F.2d 1071 (4th Cir. 1986), is not applicable, in that the fee in that case was awarded pursuant to a federal statute which expressly provides for the compensation of an attorney for his presentation and defense of his fee request, a situation not applicable herein, in that Section 8.01-364, Appendix, p. 48, does not so provide. No other authority is cited, and in particular, no Virginia authority is cited. This is because there is no such Virginia authority.

No invoice statements, time records or other evidence was submitted in support of the additional $4,725 award, other than the recitation of the memorandum order drafted by Towarnicky. As examples of the excessiveness of this fee, at

$225 per hour, he was awarded a fee of $1,125 for his preparation of the fee petition, where all that was required for the petition itself, as opposed to the defense of the claim, was the filing of the one-page invoice and the preparation of the three-page declaration that the invoice described the time expended. He was awarded fees in connection with the disbursement of the interpled fund even though, if he had complied with Section 8.01-364 and paid the fund over to the clerk in the first place, he would not have had to deal with the disbursement. The clerk would have charged only a nominal fee, if any at all, and that Towarnicky ignored the statute and took on the responsibility for disbursement should not result in his receiving a fee for doing so.

Assessment of the Initial Fee Awarded to Towarnicky

The first $2,000 of the $9,150 initial fee award to Towarnicky was assessed against Chammas, and the balance was assessed equally against Chammas and Burroughs. The jury found in favor of Burroughs for all of the damages he sought in the interpleader case. Also, the evidence showed that Burroughs attempted to settle with Chammas before the case was filed and thereafter. Therefore, Chammas alone should bear the expense of the interpleader case, since it is clear that the jury found that Chammas wholly caused the need for it.

In this regard, Chammas had agreed to pay the first $2,000 of Towarnicky's fee, which, presumably, was why the trial court assessed the first $2,000 of the fee award against Chammas alone. However, Chammas claimed that Burroughs should pay the fees and costs in excess of $2,000, because of Burroughs' conduct following Towarnicky's $2,000 proposal. Burroughs's position is that he did nothing improper in connection with or following the $2,000 proposal, in that he merely requested a fee statement from Towarnicky and acted properly thereafter. Chammas did not identify any act or

omission by Burroughs following the $2,000 proposal, which was improper. Therefore, there was no basis for the assessment of any fees or costs against Burroughs.

Assessment of the Additional Fee Awarded to Towarnicky

As to Judge Newman's having sanctioned Burroughs for filing his motion to reconsider, by assessing the full amount of the $4,725 additional fee against him, Burroughs contends that he did nothing to justify a sanction of any amount, much less $4,725.

As to the first ground for the preliminary motion that his motion to reconsider not be heard, i.e., that the motion was filed too close to the hearing, it was filed in accordance with the local rules and Towarnicky and Chammas' counsel were not in compliance with the local rules when they not only failed to seek a continuance, but also opposed Burroughs' request for a continuance. Further, opposing counsel were put on notice more than a week beforehand and received clear notice on the Monday before the Friday hearing (even though they did not receive the motion itself until the Wednesday before, per the local rule).

As to the second ground, that the motion was filed in bad faith, not only the substance of the motion, but also the lack of any evidence of a motive on Burroughs' part other than to have the motion heard, indicates that there was no bad faith. It simply cannot constitute bad faith to file a valid motion after having told one's opponent that you will do so if the case does not settle, with every intent to follow through with the motion.

As to the third ground for the preliminary motion, that no new material was presented, there are two considerations. The first is that, as shown by the argument and authorities presented above with respect to the remittitur, the setting aside of the libel

verdict, and the bases for the fee awards, the motion on its face certainly presented new material. Also, the motion to reconsider was denied not only without a hearing, but also without being read by the court, so it is clear that this third ground should not be applicable, in that Judge Newman could not have known whether new material was presented.

As to the nature of any sanction which was to be imposed, it was an abuse of discretion for Judge Newman to sanction Burroughs by increasing Towarnicky's fee award, inasmuch as the filing of Burroughs' motion to reconsider, if sanctionable, was separate from the matters considered in the determination of the fee award. Judge Newman had already denied a motion by Towarnicky for reconsideration of the portion of his fee award, which had been previously denied. Thus, if Burroughs was to be sanctioned for filing the motion to reconsider, the sanction should be limited to reflect only the motion in question, rather than the larger issue of whether the fee award should be increased for work done by Towarnicky prior to the filing of the motion.

Also, as to the sanction, Burroughs contends that the appropriate vehicle for such a sanction is a finding that it is warranted under Code of Virginia, Section 8.01-271.1 Appendix, p. 47; and that, in accordance with the case law construing such statute, his filing of the motion to reconsider was objectively reasonable under existing law, and therefore not sanctionable, in that it was timely filed in good faith in accordance with the local rules, in a nonfrivolous attempt to present to the trial court material which had not been presented at the time of the subject rulings. *Nedrich v. Jones*, 245 Va. 465, 429 S.E.2d 201 (1993).

Federal Questions Raised by Denial of Appeal by Supreme Court of Virginia

Burroughs contends that the absence of an appeal of right in Virginia, as to all civil cases, is itself a denial of the procedural due process required by federal constitutional law. In this regard, Burroughs acknowledges that current law is to the contrary and announces that a purpose of the proposed appeal is to change such law.

Further, even if such current law is upheld and there is no constitutional right to an appeal, it is Burroughs' position that the action of the Supreme Court of Virginia herein, in applying the limited statutory right to an appeal under Virginia law, denied due process and equal protection of the law to Burroughs, in violation of federal constitutional law, due to the manner of its application.

Absence of Appeal of Right as Denial of Due Process

It has long been held that if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment (Section 1) does not require a state to provide appellate review. *Lindsey v. Normet*, 405 U.S. 56, 77, 92 S.Ct. 862, 31 L.Ed. 36 (1972) (citations omitted); *M.L.B. v. S.L.J.*, 519 U.S. 102, 110, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996).

However, in *M.L.B.* this Court used equal protection together with due process to conclude that a poor mother should not be barred from an appeal in state court after she had lost her parental rights, merely because she could not afford the cost of the trial transcript. Although the state's fee was found to be reasonable, an exception to the rule that a state may impose a

reasonable fee was established, because of the "basic importance" of the mother's right which was at stake.

Burroughs initially contends that this Court should, as it did in *M.L.B.*, combine due process principles with those of equal protection, as described below, to add the right of appeal to those rights of such basic importance that each of them must receive constitutional protection under the Fourteenth Amendment.

The current lack of a constitutional right to an appeal is based solely on the lack of any such right at common law. The applicable cases of this Court simply do not contain any analysis of the lack of such right, other than to refer to the common law. In particular, if one traces this Court's references to the lack of a right of appeal back to the earliest case cited in the opinions collected and cited in *Lindsey*, supra, 405 U.S., at 77, rendered over the last 107 years, it is clear that there is no rationale for the point in question other than that the common law did not provide for a right of appeal. None of these cases offers any analysis other than a reference to the common law. The earliest case cited on this point, and expressly followed by this Court ever since, is *McKane v. Durston*, 153 U.S. 684, 687-688, 14 S.Ct. 913, 38 L.Ed. 867 (1894), wherein this Court stated

> An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. A review by an appellate court of the final judgment in a criminal case, however grave the offence of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the State to allow or not to allow such a review. A citation of authorities upon the point is unnecessary.

Thus, the question presented is whether modern standards of due process permit the denial of an appeal of right in Virginia, as was the case under the common law.

As reported by the Judiciary Committee of the Virginia State Bar Association (VSBA) in its reports, "Appellate Review in Virginia, 1994, 1997, Appendix, p. 52, only two other states require that a civil litigant in a case such as presented herein petition for an appeal, New Hampshire and West Virginia. Therefore, it is readily apparent that, in addition to the federal government, the great majority of the state governments believe that their citizens should have an appeal of right in all cases where the stakes are at all significant. Of course, however persuasive, this fact by itself does not equate to a requirement for a constitutional right to an appeal. Rather, it is an important aspect of this Court's consideration of the issue at hand.

Another important aspect to consider is that the Information Age has resulted in an extraordinary increase in the complexity and volume of the issues being presented to the trial courts of the various states.

In this regard, in the 1994 edition of "Appellate Review in Virginia," *id.*, VSBA studied the problem of the difficulty encountered by the citizens of Virginia in obtaining appeal of a majority of civil case, due to the lack of an appeal of right. Its report stated

> There is an avalanche of appellate filings in the United States. Virginia is no exception. The number of appellate filings in Virginia is more than 60% higher than when the Court of Appeals of Virginia was founded eight years ago. "Appellate Review in Virginia, 1994" *id.. p. i.*

In *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct 1011, 25 L.Ed. 287 (1970), this Court stated that the rudimentary elements of due process include the opportunity to be heard in a "meaningful manner," in addition to adequate notice and the opportunities to confront witnesses, to have the assistance of counsel, and to be heard by an impartial authority whose decision is based only on the evidence and the law, under established rules of procedure.

In *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), the flexibility of the concept of due process was emphasized, and it was held that

> (I)dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used; and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. 424 U.S., at 336.

The *Mathews* court cited *California Workers v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d. 1230 (1961), for the point that "(d)ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." Likewise, the *Mathews* court cited *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d. 484 (1972), wherein it was held that "due process is flexible and calls for such procedural protections as the particular situation demands."

Thus, since our nation's founding, from "generation to generation," many of the legal principles set forth in the common law have been abandoned or modified to meet federal constitutional standards. *District of Columbia v. Clawans*, 300 U.S. 617, 627, 57 S.Ct. 660, 81 L.Ed. 843 (1937). This is because, in today's world, factors unknown to the drafters of our constitution have made the modifications necessary. For example, punishment that was not cruel and unusual two centuries ago is now barred; a right to counsel has been established; and discrimination, which was once condoned, is now barred.

As to the rudimentary elements of due process stated in *Goldberg*, Burroughs contends that, to be heard in a "meaningful manner" in today's world, a litigant must be afforded an appeal of right. The Information Age has generated complexity and volume such that the burden of resolving conflict in a reasonable manner cannot reasonably be placed on the trial courts alone.

Consideration of the *Mathews* criteria makes it clear that the flexibility of the concept of due process is available to accomplish the needed change. The private interest to receive an accurate and fair litigation result is great, and the governmental burden in affording an appeal of right is not disproportionate. In Virginia, the legislature must expand the jurisdiction of the Court of Appeals, which may well lead to the need for additional judges, but this burden is not enough to outweigh the need for an appeal of right in all civil cases. Indeed, the VSBA has estimated in the 1994 edition of "Appellate Review in Virginia," *id.*, p. 41, that the implementation of its recommendation that an appeal of right be afforded in all cases will cost about $1.5 million, with a continuing cost of about $600,000 annually thereafter, not a great amount in the overall budget of the Commonwealth.

However, it is the remaining criterion of *Mathews* which merits special attention. The risk of an erroneous deprivation of the private interest to receive an accurate and fair litigation result is much greater if there is no appeal of right, and the probable value of the additional safeguard of an appeal of right is high.

Therefore, upon consideration of the criteria of *Goldberg* and *Mathews*, it is clear that due process under the Fourteenth Amendment should require the states to afford an appeal of right.

As the result of its said studies of appellate review in Virginia, VSBA recommended an appeal of right in all cases, civil and criminal, stating

> We recommend that a phased, long-term plan be pursued in the Commonwealth to reach a fundamental goal: each litigant should be assured of one level of appellate review of trial court dispositions - as a matter of right - in all cases, civil and criminal. "Appellate Review in Virginia," *id.*, 1994, p. 33.

In 1997, the said VSBA report was updated for the Virginia Governor and General Assembly, as 1998 House Document No. 55, pursuant to a joint resolution of the House and Senate. However, no legislative action has been taken to date to establish an appeal of right in all civil cases. Therefore, this Court should act to remedy the situation in Virginia.

The time has come to abandon the common law basis for not including an appeal of right within the scope of constitutional due process, and to apply the criteria of *Goldberg* and *Mathews* to determine whether an appeal of right in state courts is required as a part of the due process guaranteed under the Fourteenth Amendment; or, in the alternative, this Court should find the

right to appellate review to be of such basic importance that it is to be afforded the protection of the Fourteenth Amendment.

Under the common law, a fair trial was all that was guaranteed - the magistrate had the last word. Given the rigor required of today's trial courts, and the profound consequences of their decisions in our litigious society, does the absence of an appeal of right meet due process requirements? Burroughs contends that it does not, and that, therefore, this Court should revisit the issue.

Application of Limited Statutory Right to Appeal as Denial of Due Process

Burroughs contends that the denial of an appeal in the face of the abuses of discretion in this case constitutes a denial of procedural due process, independently of the absence of an appeal of right in Virginia. However, it is the trial court's error of ignoring the mandatory requirements of Virginia Code Sections 8.01-383, 383.1 that surely constitutes a violation of due process requirements. Under these statutes, upon the exercise of discretion to grant a remittitur, the plaintiff is to be afforded an opportunity to elect between acceptance of the remitted amount and a new trial on damages, or, in the alternative, the trial court is to order a new trial. This Court will note that there is absolutely no question that this statutory violation occurred. Nonetheless, the petition for appeal was denied.

Thus, in its denial of the petition for appeal under the Virginia statutes governing appeals, the Supreme Court of Virginia denied federal procedural due process. This is because, in the trial court, Burroughs was not heard by an impartial authority whose decision was based on the law, in accordance with established rules of procedure, as required by *Goldberg*. Rather, the trial court ignored the applicable law and procedure.

Therefore, when Burroughs was denied an appeal by the Supreme Court of Virginia, as to the said denial of due process by the trial court, he was again denied procedural due process. This was because he was denied an opportunity to be heard in a meaningful manner concerning the error of the trial court, as required by *Goldberg*.

The Virginia State Bar Association, in stating its reasons for recommending an appeal of right in all cases said

> Summarizing a tremendous amount of information arrayed in other sections of the Committee's report, the dominant problems militating for fundamental change in the appellate system in Virginia are two. First, the proportion of appeals granted a full hearing is low, lower than it has been at almost any point over the past 50 years, and there is no assured path to a hearing; no grounds are given when an appeal is denied by the Supreme Court. We believe it to be fundamental to provide one opportunity for appellate review in all cases. Second, the Supreme Court, saddled with direct appeal from the trial courts in general civil cases, must perform far too much error correction under the present system, rather than being free to concentrate on shaping and developing the law of the Commonwealth on new issues. "Appellate Review in Virginia," *id.*, 1994, p. 33.

Further, the VSBA stated in its 1997 update of its 1994 report on appellate review in Virginia, addressed to the Governor and the General Assembly, that

> The effect of the direct civil review function is that in Virginia seven Supreme Court Justices perform an error correction function that nationwide generally is performed by three intermediate appellate judges. The

> direct civil appeal function of the Supreme Court (i) limits the number of appeals from the Court of Appeals that may be heard, (ii) likely contributes to the small percentage of such appeals that are heard, (iii) likely underlies the 1994 Bar Survey responses indicating that some areas of the law are not well developed, and (iv) likely underlies the 1994 Bar Survey responses indicating that the Supreme Court is not able to hear all meritorious appeals. 1997 Update of "Appellate Review in Virginia," *id.*, 1997, p. 2..

A reasonable conclusion to be drawn from the VSBA studies, as viewed in the context of the instant case, is that the Supreme Court operates under the existing Virginia statutes on a certiorari basis, to the exclusion of those cases for which it has no time, or which it has no inclination to hear, regardless of the merits.

It will no doubt be argued that, in each case is which a petition for appeal is denied, the court states that it has found "no reversible error," implying that the case was considered on its merits. However, in light of the trial court's errors, especially with respect to the statutory violation, the only explanation for such a ruling in the instant case is that the violation of the statute was harmless error, and such an explanation is implausible. It is clear that the denial of an election and/or a new trial was not harmless error. Thus, despite the implication of the wording of the court's order, it appears reasonable to conclude that the matter was not considered on its merits.

Burroughs contends that, in this case and all other similar cases, the Supreme Court of Virginia has, by its denial of an appeal, denied due process under the Virginia statutes governing appeals; and that this Court should review its actions.

Application of Limited Statutory Right to Appeal as Denial of Equal Protection

In *Lindsey v. Normet*, supra, it was held that

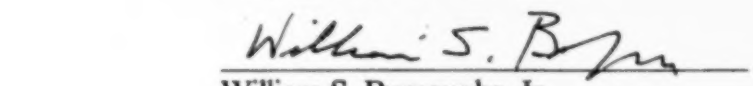
> When an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause. 405 U.S. at 77.

This point was reiterated in *M.L.B.*, supra, 519 U.S., at 111.

Herein, if one makes the reasonable assumption that the Supreme Court of Virginia does, in some cases, grant an appeal of a non-harmless violation of a Virginia statute, it is apparent that Burroughs did not receive the same protection of the law as that received by those whose petitions for appeal were granted, inasmuch as there were valid grounds for an appeal herein, just as there was in each of the cases where an appeal was granted. There was no rational basis to treat Burroughs differently.

It is this type of capricious and arbitrary application of state statutes with which *Lindsey* and *M.L.B. were* concerned. Therefore, this Court should review the actions of the Supreme Court of Virginia herein.

Respectfully submitted,



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APPENDIX

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Memorandum Order of the Circuit Court
of Arlington County, Virginia, Undated

VIRGINIA: IN THE CIRCUIT COURT FOR
ARLINGTON COUNTY

IN RE:
ESTATE OF KIM LIEN THI SU THAI Fiduciary: 23035

JAMES M. TOWARNICKY, et al,
Plaintiffs,
v. Chancery No. 98-327

LABIB CHAMMAS, et al,
Defendants.

WILLIAM S. BURROUGHS, JR.,
Plaintiff,
v. At Law No. 99-258

LABIB CHAMMAS,
Defendant.

MEMORANDUM ORDER

THIS MATTER came before the Court on application of the interpleader plaintiffs in Chancery No. 98-327 for an award of fees and costs associated with their involvement in the interpleader; and the opposition of Defendant William S. Burroughs ("Burroughs") thereto. The issue is the amount of the award and which of the defendants in the interpleader case, Burroughs or Labib Joseph Chammas ("Chammas"), should have thos costs assessed against him.

Under the authority set forth in *Pettus v. Hendricks et al., v. Firemen's Relief Ass'n, et al.*, 113 Va 326, 74 S.E. 191 (1912), plaintiffs have requested a payment of their attorneys'

fees and costs for their actions in these consolidated cases. Burroughs and Chammas both agree that plaintiffs are entitled to recover reasonable attorney's fees and costs in initiating and prosecuting these actions in this Court. Burroughs and Chammas have agreed that plaintiffs may be paid $2,000 of the original interpled fund (the "Fund") of $52,000.[1] That is where the agreement ends.

Burroughs claims: (i) under the holding of *Pettus v. Hendricks*, supra, all of the fees and costs are to be assessed against Chammas' portion of the Fund; (ii) if any of the fees and costs are to be assessed against Burroughs, the fees and costs are for unnecessary work, and so are unreasonable. Chammas does not oppose interpleader plaintiffs' application, except to assert that all of said fees and costs in excess of $2,000 were solely the result of Burroughs' actions in the case, and therefore should be assessed against Burroughs' portion of the fund.

The parties agreed, on or about March 19, 1999, in a pre-trial motion that interpleader plaintiffs would be discharged from these consolidated cases, and that the issue of fees and costs to be awarded interpleader plaintiffs would be heard by post-trial motion. This agreement and understanding was reaffirmed prior to trial on November 1, 1999. Accordingly, plaintiffs were required to present no evidence.

The jury returned a verdict for Burroughs in Chancery No. 98-327 and At Law No. 99-258. Consequently, Burroughs is correct that he is the "prevailing party" in Chancery No. 98-32.[2] In a timely-filed post-trial motion, interpleader plaintiffs

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[1] Burroughs argues in his Affidavit and Supplemental Memorandum in Opposition to Motion of James M. Towarnicky for Award of Fee and Costs (the "Opposition"), that having agreed with Chammas that plaintiffs may assess $2,000 against the Fund, plaintiffs would have to return the same if this Court awarded a lower fee. Notwithstanding that allowing plaintiffs to spend money they already are holding renders such agreement meaningless, in light of the holding of this Court that in excess of $2,000 is to be awarded plaintiffs, this issue is moot.

[2] By post-trial motion this Court granted a Motion for Remittitur by Chammas in Chancery No. 98-327 and a Motion to Set Aside the Jury Verdict in At Law No. 99-258.

requested $11,350 in fees and costs by the submission of an affidavit and an itemized invoice of James M. Towarnicky, P.L.L.C. By oral motion and written affidavit at the hearing conducted December 20, 1999, interpleader plaintiffs moved that the costs of preparing and pursuing the fee award in an amount of approximately $2,025 be awarded.

By letter dated January 12, 2000, this Court awarded plaintiffs $9,150 in fees and costs, and assessed $5,575 against the Chammas share of the Fund and $3,575 against the Burroughs' share of the Fund. Upon motion to reconsider and amend by both plaintiffs and Burroughs, this Court was requested to specify the reasons for its award. In addition, interpleader plaintiffs renew their request that the full amount of their fees and costs be awarded, as well as the time spent in repairing and pursuing the fee petition prior to this date. Burroughs' renews his objection to the amount of the fees and costs awarded, and moves this Court to reconsider in a 34-page motion and memorandum.

At the outset, it should be noted that Virginia's interpleader statute, Section 8.01-364, is modeled after the federal interpleader statutes. The legislative history of the Virginia statute states that "the purpose of the statute is to provide Virginia with a...modern statutory method of interpleader comparable to those which exist in...the federal system." Consequently, the reasoning of decisions of Federal Courts in Virginia and the United States Fourth Circuit Court of Appeals are applicable.

In determining a fee award, this Court should "determine a lodestar figure by multiplying the number of reasonable hours expended times a reasonable rate." See *Daly v. Hill*, 790 F.2d 1071, 1077 (4th Cir. 1986). Burroughs, while not conceding, also does not contest Towarnicky's rate of $225.00 per hour. The sole remaining objections, then, are to the "number of reasonable hours expended," and whether any of an award of costs and fees should be assessed against Burroughs' portion of the Fund.

Generally, twelve factors are looked-to in determining what are reasonable hours and rates. *Barber v. Kimbrell's Inc.*, 577 F.2d 216, 226 n. 28(4th Cir. 1978).[3] This Court has considered those factors applicable to an interpleader action in addressing whether to award fees and costs to plaintiffs, and how those fees and costs should be assessed.

Burroughs' first objection is that items 1,2 and 3 of the Towarnicky invoice are centered on the fact those charges arise prior in time to the filing of the interpleader action. Burroughs argues that they therefore cannot be related or necessary to that action. The entries dated "3/31/98" and "4/3/98" appear to be related to a dispute between interpleader plaintiffs, Burroughs, and Chammas, but nothing in the invoice suggests that an interpleader action is contemplated. Accordingly, the Court cannot conclude that these were reasonable and necessary expenses of the interpleader plaintiffs with regard to the interpleader action, and are not to be awarded (-$562.50).

Similarly, the third entry dated "4/17/98" allocates four hours for "[r]esearch of attorneys' lien and review of file and Burroughs' letter." If interpleader plaintiffs are claiming this research was necessary before determining whether to file an interpleader action, the Court finds such time is more properly described in the next entry dated "4/30/98:" "Research of Bill in Interpleader/costs/Teleconference with Client/Draft." Consequently, it appears to the Court that most of the third entry was not a necessary cost of the Bill in Interpleader, and so those remaining fees are also not to be awarded (-$675.00).

As to the fourth entry just mentioned, Burroughs says these and the fifth and sixth entries dated "5/13/98" and "6/3/98" were excessive because a single code section was involved and the facts were not complicated or lengthy. The Court disagrees.

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[3] 1. Time and labor expended; 2. Novelty and difficulty of the questions raised; 3. Skill required to properly perform the legal services rendered; 4. Attorney's opportunity costs in pressing the instant litigation; 7. Time limitations imposed by the client or circumstances; 8. Amount in controversy and the result obtained; 9. Experience, reputation and ability of the attorney; 10. Undesirability of the case; 11. Nature and length of the professional relationship between attorney and client; and attorneys' fees awards in similar cases.

The myriad number of claims, counterclaims, motions, appeals and disputes between Burroughs, Chammas and now interpleader plaintiffs in Chancery No. 96-614 and again in Chancery No. 98-327 leads the Court to conclude it is not unreasonable that plaintiffs were justified in thoroughly investigating what their appropriate course of action should be to avoid liability. It was not just "one Code Section." The facts have proven to be anything but simple. The objection to this fee request is overruled.

Towarnicky has consented to the objection to the entry date "6/23/98" (-$675.00).[4] Burroughs objects to the seventh entry dated "6/30/98:" "Review of documents concerning claim of Burroughs/VA Bar" on the grounds that "the work had nothing to do with the interpleader case." The Court disagrees. Most of the reason that the interpleader action filed in 1998 is still not resolved relates to Burroughs' claim for fees and Chammas' claims of malpractice. More to the point, those documents were introduced into the interpleader case. To sustain Burroughs' objection would be for this Court to find that it was unreasonable for interpleader plaintiffs' counsel to read and review a Court pleading. In addition, Burroughs objects that the time involved to conduct such review was excessive. The document were 42 pages, single spaced, involving long handwriting. That equals approximately 10 1/2 pages per hour, or approximately 5 3/4 minutes per pate, without any breaks. Such time is not unreasonable. Objection overruled.

Burroughs next objects to the entry dated "8/3/98:" "Attendance at Hearing" on the grounds it was unnecessary for interpleader plaintiffs to attend a hearing of a default motion by Burroughs in the interpleader case. This Court is unwilling to conclude that a plaintiff's attorney attending a hearing in his own case is unreasonable. Objection overruled.

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[4] The consent was only for two hours in Towarnicky's reply motion, but the invoice clearly states three hours of time for the matter. Accordingly, lodestar is reduced by three hours, or $675.00.

Lastly, Burroughs objects to the entries dates "2/4/99," "3/1/99," "3/5/99," "3/8/99" and "3/9/99" on the grounds that these fees are associated with discovery propounded by interpleader plaintiffs in the interpleader case, which was unwarranted. Response of interpleader plaintiffs' counsel was that, because Burroughs had refused to previously discharge his client from the case despite previous requests -- and even demands -- by interpleader plaintiffs, they were entitled to find out through discovery what their role in the case was, what the objection to discharge was, and whether they would be required to present evidence at trial. Indeed, those issues still had not been resolved at the start of trial on November 1, 1999, even after the agreement between the parties of March 19, 1999. The Court cannot conclude that the discovery was unnecessary.

Burroughs incorrectly assumes that interpleader plaintiffs were not facing potential liability to Burroughs or Chammas prior to plaintiffs being discharged on March 19, 1999. It is the very essence of interpleader that the interpleader plaintiffs not be required to face liability on inconsistent claims for the same asset. If Burroughs would not discharge the interpleader plaintiffs immediately after the filing of the bill in interpleader, there had to be a reason. They were therfore in determining if there was the possibility of independent liability asserted against plaintiffs. See, *e.g.*, holding of *Sovran Bank, N.A. v. Bedford Park Assoc.'s Ltd. Partnership & Proper Hill*, 23 VA. Cir. 110 (Cir. Ct. Fairfax County, 1981). Burroughs has stated in hearings that "of course" interpleader plaintiffs had been released from liability. That is not true. If that were the case, then interpleader plaintiffs could keep the Fund without liability. If paid to Burroughs, Chammas could claim a failure of consideration as to the settlement agreement in Chancery No. 96-614 (the reason for the interpleader). If paid to Chammas, interpleader plaintiffs could be sued for violation of Burroughs' asserted attorneys' lien.

When were interpleader plaintiffs to be certain, in writing, that the liability was over? Interpleader Plaintiffs warned Burroughs in March, 1999 that, unless they were discharged from the litigation, they would have to propound discovery.

Burroughs requested that they hold off on such action until settlement discussions could be pursued with Chammas. When Burroughs did not later respond, interpleader plaintiffs did indeed conduct that discovery. Burroughs cannot be held now to complain that such discovery was unnecessary. This objection is also overruled.

Consequently, as was set forth in the Court's order of January 12, 2000, interpleader plaintiffs' fees and costs of $11,350 are to be reduced by $2,200, resulting in a figure of $9,150.00. In their motion for reconsideration, interpleader plaintiffs request that this Court reconsider time spent by them to pursue and secure this award of fees and costs, and deal with post-judgment motions. Burroughs objects that, once discharged, any involvement by interpleader plaintiffs was unnecessary, and therefore noncompensatory. Such ojections are contrary to the facts and law.

It is well-settled that time spent defending entitlement to attorneys' fees is properly compensable. *Daly v. Hill*, 790 F.2d 1071 (4th Cir. 1986). The fee petition had to be prepared. Plaintiffs had to review the first order of this Court, which order was vacated. Counsel was present at Court for three hours on December 20, 1999. Counsel was present for a hearing March 24, 2000, as well as April 14, 2000. Indeed, Burroughs' supplemental opposition is twenty pages in length, and his motion for reconsideration is 34 pages in length. Interpleader plaintiffs' counsel is therefore entitled to spend a commensurate amount of time reviewing the documents. Burroughs' position appears to be that time spent in pursuing attorneys' fees and costs is not properly compensable. Such a position is counterintuitive. Otherwise, there is no incentive for an interpleader defendant to resolve the dispute expeditiously. Indeed, as here, numerous objections, delay, and lengthy pleadings would unfairly prejudice interpleader plaintiffs if they could not be compensated.

As stated by the U.S. Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) "[a] request for attorneys' fees should not result in a second major litigation." Nevertheless, this court has conducted three hearings on the issue. Based on

that time in Court, the length and complexity of the briefs, and the merits of interpleader plaintiffs' claims, this Court finds an additional fee in preparation and defense of lodestar of the interpleader plaintiffs of one hour for November 1, 1999; five hours for the petition; one hour for issues regarding vacating the November 12, 1999 order; two hour in opposition to Burroughs' motion for an evidentiary hearing regarding the fee petition; one hour for the hearing continued from December 6, 1999; three hours for preparation and attendance at the December 20, 1999 hearing; four hours for preparation and attendance at the March 24, 2000 hearings; and four hours for preparation and attendance at the motion for reconsideration April 14, 2000; or 1+5+1+2+1+3+4+4=21 x $225 = $4,725.00.

Burroughs has requested this Court to reconsider the fee award and also whether Burroughs, as the prevailing party under the holding of *Pettus v. Hendricks*, supra., should have any of the fee award assessed against him. That is the last issue to be addressed.

The Court recognized the *Pettus* holding in formulating its original order. However, Chammas argues the rule of that case is that interpleader plaintiffs' costs should not be assessed merely against the nonprevailing party, but rather against the interpleader defendant that impedes the resolution of the case or issue.

Unusual facts are present in this case. After filing the Bill of Complaint and amendment, Chammas filed a cross-bill, and the case of At Law. No. 99-298 was consolidated. At this time, according to Burroughs' argument at hearing, the interpleader plaintiffs were released from liability. That obviously was not the case. But release or not, Burroughs and/or Chammas could have moved to discharge the interpleader plaintiffs. They did not do so.

Realizing that interpleader plaintiffs' continued presence in the case(s) would only serve to deplete the interpled fund, interpleader plaintiffs' counsel ("Towarnicky") proposed to both defendants that interpleader plaintiffs be discharged, and offered to compromise fees and costs to $2,000. Towarnicky drafted an

order to that effect, and sent it to opposing counsels. Chammas' counsel signed the order, but Burroughs would not, claiming that the fees and costs award could be resolved absent an order of this Court and demanding an accounting from Towarnicky. Towarnicky, knowing that the fees and costs had far exceeded the compromise account, withdrew the offer in the face of Burroughs' demand, reasoning that if he were to perform an accounting, he should be compensated for all of his time to date.

Burroughs' demand was sent to Towarnicky via letter in October, 1998. Towarnicky hand scribbled a heated -- almost insulting -- reply to Burroughs informing Burroughs that he was "looking a gift horse in the mouth." From this point in time it is clear to the Court that both interpleader defendants were aware of the issue of discharge and that interpleader plaintiffs' continued presence in the case would result in fees and costs assessed against the interpled Fund.

Burroughs prolonged the interpleader plaintiffs' presence in the case by not moving to discharge them in June of 1998, again in August, 1998, and certainly in October, 1998, when Towarnicky almost insulted Burroughs for not discharging interpleader plaintiffs and keeping them in the cases. Accordingly, because Chammas agreed to discharge when the total fee offered by Towarnicky in September, 1998 was $2,000, Chammas should not be held solely responsible for additional fees and costs payable to the interpleader plaintiffs above that amount, because those fees are primarily attributable to Burroughs' refusal to discharge. As the nonprevailing party, these $2,000 of conceded costs are properly assessable against Chammas. *Pettus v. Hendricks*, supra.

However, the Court cannot determine from the record before it that the failure to promptly discharge interpleader plaintiffs before trial was solely that of Burroughs. Chammas could have filed his own motion to discharge interpleader plaintiffs, but did not do so.[5] Accordingly, in its original order,

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[5] Chammas may have been fearful that Towarnicky would withdraw his offer to discount the fees and costs.

the balance of the award of $9,150 in excess of $2,000 was assessed against Burroughs and Chammas equally, because both were culpable for interpleader plaintiffs' continued involvement in the cases.

It is plain from the pleadings, however, that all of interpleader plaintiffs' fees and costs allocable to pursuing their fee petition are solely attributable to Burroughs. Chammas has never challenged in any way the post-trial motions of interpleader plaintiffs. Because Burroughs alone has challenged those fees, those charges are properly assessable against his portion of the award. To not do so would unfairly prejudice Chammas for accepting what were reasonable charges, and reward Burroughs for unnecessarily prolonging these matters.

Burroughs has further argued that the size of the fees and costs award to interpleader plaintiffs is unreasonable and excessive in light of the size of the interpled Fund. Such an argument is unpersuasive. It is apparent to the Court that the numerous pleadings, memoranda and motions of Burroughs in this case have been filed without regard to the time and economic resources involved. In addition, it was Burroughs who disregarded the repeated warning admonishments of the interpleader plaintiffs not to waste the interpled Fund by discharging interpleader plaintiffs from the cases. Also, it is long held that the amount of the fund is not a bar to a recovery of attorneys' fees in a much greater amount. See, *e.g.*, *Trimper v. City of Norfolk, Virginia*, 58 F.3d 68 (4th Cir. 1995) [$100 award justifies $5,280 award of attorneys fees].

Judgment will be entered consistent with this opinion.

/s/ William T. Newman, Jr.
William T. Newman, Jr.
Circuit Court Judge

Final Judgment Order of the Circuit Court
of Arlington County, Virginia, Dated May 23, 2001

VIRGINIA: IN THE CIRCUIT COURT FOR
ARLINGTON COUNTY

IN RE:
ESTATE OF KIM LIEN THI SU THAI Fiduciary: 23035

JAMES M. TOWARNICKY, et al,
Plaintiffs,
v. Chancery No. 98-327

LABIB CHAMMAS, et al,
Defendants.

WILLIAM S. BURROUGHS, JR.,
Plaintiff,
v. At Law No. 99-258

LABIB CHAMMAS,
Defendant.

FINAL JUDGMENT ORDER

THESE CAUSES came before this Court for trial, the verdict of a jury being rendered on November 4, 1999. Post-trial motions were properly noticed and heard December 20, 1999. Various rulings having been made by this Court both from the Bench and in writing. Motions to reconsider or amend such rulings have been filed, the hearings of which were conducted March 24, 2000 and April 14, 2000; and

IT APPEARING TO THE COURT that all post-trial motions in these cases, including, but not limited to, motions to reconsider previous rulings by this Court, have been fully resolved, it is therefore:

ADJUDGED, ORDERED and DECREED, for the reasons set forth in open Court April 14, 2000, that the Motion of William S. Burroughs, Jr. ("Burroughs") to Reconsider is DENIED, except as it pertains to the proper amount of fee award to be granted interpleader plaintiffs; and it is

ADJUDGED, ORDERED and DECREED, that Interpleader Plaintiffs James M. Towarnicky, James M. Towarnicky, P.L.L.C. (as successor-in-interest to Towarnicky & Nissen, P.L.L.C.) and the Estate of Kim Lien Thi Su Thai, Fiduciary No. 23035 (collectively, the "Thai Parties"), have no liability with respect to Defendants William S. Burroughs ("Burroughs") or Labib Joseph Chammas ("Chammas") for any claim, matter or liability raised in Chancery Nos. 98-327 and 96-614, other than as set forth in this Final Judgment Order; and it is

FURTHER ADJUDGED, ORDERED, and DECREED, that, it having been demonstrated to the Court that there was no evidence of malice of Defendant Labib Joseph Chammas ("Chammas") independent of the communication giving rise to the claim of defamation, which evidence of malice was necessary to defeat the qualified privilege of Code of Virginia of 1950 (as amended) Section 54.1-3908, Chammas' Motion to Set Aside the Jury Verdict in At Law 99-258 is granted and Chammas' Motion for Remittitur from the verdict of the jury in Chancery 98-327 is GRANTED, and

FURTHER, ADJUDGED, ORDERED, and DECREED, that the Motion for Remittitur being granted, judgment is entered for the Defendant Burroughs in Chancery No. 98-327 against the interpled fund in a reduced amount from the jury verdict; and it is

FURTHER ADJUDGED, ORDERED, and DECREED, that judgment is awarded for Burroughs against the interpled fund in the amount of Seventeen Thousand, Three Hundred Thirty-Three Dollars ($17,333.00), plus pre-judgment interest on that sum from April 27, 1998, to December 3, 1999 at the rate of nine per centum (9%) per annum (the "Burroughs Award") but reduced as set forth below; and it is

FURTHER, ADJUDGED, ORDERED, and DECREED, that the Thai Parties shall remit so much of the Burroughs Award as has not already been paid from the interpled fund to Burroughs, but less and excepting any amount of the fees and costs of the interpleader action in Chancery No. 98-327 (the "Fee Award") apportioned to Burroughs as Burroughs' share, all as set for the below and it is

FURTHER ADJUDGED, ORDERED and DECREED, that, for the reasons set forth in the accompanying Memorandum Order, James M. Towarnicky is awarded the sum of $9,150.00 for fees and costs accruing prior to November 1, 1999 (the "Original Fee"); and $4,725.00 in processing, applying and defending the Original Fee (the "Additional Fee"); and it is

FURTHER ADJUDGED, ORDERED and DECREED, that, for the reasons set forth in the accompanying Memorandum Order, $2,000 of the Original Fee shall be assessed against Chammas' portion of the interpled fund (the "Chammas Award"); and it is

FURTHER ADJUDGED, ORDERED and DECREED, that one-half of the remaining Original Award ($3,575.00) shall be assessed against each of the Chammas Award and the Burroughs Award; and it is

FURTHER ADJUDGED, ORDERED and DECREED, that, for the reasons set forth in the accompanying Memorandum Order, the Additional Fee in the amount of $4,725.00 is to be assessed against the Burroughs Award; and it is

FURTHER ADJUDGED, ORDERED and DECREED, that after payment of the Original Fee and the Additional Fee from the interpled fund, the remaining interpled fund balance shall be paid to Chammas; and it is

FURTHER ADJUDGED, ORDERED and DECREED that, to the extent Burroughs has already received interpled funds from the Thai Parties in excess of the Burroughs Award less the amount of the Additional Fee and the amount of the Original Fee to be assessed against the Burroughs Award, Burroughs shall immediately remit such excess amount to counsel for Chammas; and it is

FURTHER ADJUDGED, ORDERED and DECREED, that to the extent any previous orders of this Court are inconsistent with this Final Judgment, the previous orders are modified to the extent they comport with this Final Judgment Order; and it is

FURTHER ORDERED that, should Burroughs appeal from this order, the appeal bond is set at $6,000.00, without surety; and said bond shall not stay Towarnicky's immediate disbursement of the interpled fund in accordance herewith.

THIS CAUSE IS FINAL.

Entered this 23rd day of May, 2000.

/S/William T. Newman, Jr.
William T. Newman, Jr.
Circuit Court Judge

SEEN AND AGREED;
/S/James M Towarnicky
James M. Towarnicky, #26549
James M. Towarnicky, P.L.L.C.
6810 Commerce Street, #200
Springfield, VA 22150
(703)644-6660
Counsel to Estate of Kim Lien Thi Su Thai

SEEN and OBJECTED TO as to Judgment in Chancery No. 98-377 and denial of motion to Set Aside Jury Verdict
/S/ Spencer D. Ault
Spencer D. Ault,
Johnson, Young & Ault, P.C.
116-L Edwards Ferry Road
Leesburg, VA 20176
(703)777-8866
Counsel for Labib Joseph Chammas

SEEN AND OBJECTED TO as to Judgment for Chammas
Law No. 98-327 and Remittitur and award of
attorney's fees to Towarnicky in Chancery No. 99-258
/S/ William S. Burroughs, Jr.
William S. Burroughs, Jr.
2019 North Potomac Street
Arlington, VA 22205
(703)534-5232
pro se

Judgment Order of the Supreme Court of Virginia, Denying Petition for Appeal, Dated March 6, 2001

VIRGINIA: In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday, the 20th day of April, 2001.

William S. Burroughs, Jr., Appellant

Record No. 002056

against

Circuit Court Nos.
CH98-327 and CL 99-258

Labib Joseph Chammas, et al., Appellees

From the Circuit Court of Arlington County

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of the appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

Judgment Order of the Supreme Court of Virginia, Denying Petition for Rehearing, Dated April 20, 2001

VIRGINIA: In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday, the 20th day of April, 2001.

William S. Burroughs, Jr., Appellant

Record No. 002056

against

Circuit Court Nos.
CH98-327 and CL 99-258

Labib Joseph Chammas, et al., Appellees

Upon a Petition for Appeal

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 6th day of March, 2001, and grant a rehearing thereof, the prayer of the said petition is denied.

Fourteenth Amendment to the Constitution of the United States

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the states wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code: Title 28, Section 1257

State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term highest court of a State includes the District of Columbia Court of Appeals.

Code of Virginia: Section 8.01-271.1

8.01-271.1. Signing of pleadings, motions, and other papers; oral motions; sanctions. -- Every pleading, written motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, and the attorney's address shall be stated on the first pleading filed by that attorney in the action. A party who is not represented by an attorney, including a person confined in a state or local correctional facility proceeding pro se, shall sign his pleading, motion or other paper and state his address.

The signature of an attorney or party constitutes a certificate by him that (i) he has read the pleading, motion, or other paper, (ii) to the best of his knowledge, information and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and (iii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of

litigation. If a pleading, written motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant.

An oral motion made by an attorney or party in any court of the Commonwealth constitutes a representation by him that (i) to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and (ii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

If a pleading, motion or other paper is signed or made in violation of this rule, the court, upon motion or upon it own initiative, shall impose upon the person who signed the paper or made the motion, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper or making of the motion, including a reasonable attorney's fee.

Code of Virginia: Section 8.01-364

8.01-364. Interpleader. - A. Whenever a person is or may be exposed to multiple liability through the existence of claims by others to the same property or fund held by him or on his behalf, such person may file a pleading and require such parties to interplead their claims. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant in an action who is exposed to similar liability may likewise obtain such interpleader. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Section 8.01-5.

B. The remedy herein provided is in addition to and in no way supersedes or limits the remedy provided by any other section of this Code.

C. In any action of interpleader, the court may enter its order restraining all claimants from instituting or prosecuting any proceeding in any court of the Commonwealth affecting the property involved in the interpleader action until further order of the court.

Such court shall hear and determine the case and may discharge the appropriate party from further liability, make the injunction permanent, and make all appropriate orders to enforce its judgment.

D. A person interpleading may voluntarily pay or tender into court the property claimed, or may be ordered to do so by the court; and the court may thereupon order such party discharged from all or part of any liability as between the claimants of such property.

Code of Virginia: Sections 8.01-383, 383.1

8.01-383. Power to grant new trial; how often. -- In any civil case or proceeding, the court before which a trial by jury is had, may grant a new trial, unless it be otherwise specially provided. A new trial may be granted as well where the damages awarded are too small as where they are excessive. Not more than two new trials shall be granted to the same party in the same cause on the ground that the verdict is contrary to the evidence, either by the trial court or the appellate court, or both.

8.01-383.1. Appeal when verdict reduced and accepted under protest; new trial for inadequate damages. -- A. In any action at law in which the trial court shall require a plaintiff to remit a part of his recovery, as ascertained by the verdict of a jury, or else submit to a new trial, such plaintiff may remit and accept judgment of the court thereon for the reduced sum under protest, but, notwithstanding such remittitur and acceptance, if

under protest, the judgment of the court in requiring him to remit may be reviewed by the Supreme Court upon an appeal awarded the plaintiff as in other actions at law; and in any such case in which an appeal is awarded the defendant, the judgment of the court in requiring such remittitur may be the subject of review by the Supreme Court, regardless of the amount.

B. In any action at law when the court finds as a matter of law that the damages awarded by the jury are inadequate, the trial court may (i) award a new trial or (ii) require the defendant to pay an amount in excess of the recovery of the plaintiff found in the verdict. If either plaintiff or the defendant declines to accept such additional award, the trial court shall award a new trial.

If additur pursuant to this subsection is accepted by either party under protest, it may be reviewed on appeal.

Code of Virginia: Section 8.01-670

8.01-670. In what cases awarded. -- A. Except as provided by Section 17.1-405, any person may present a petition for an appeal to the Supreme Court if he believes himself aggrieved:

1. By any judgment in a controversy concerning:

a. The title to or boundaries of land,

b. The condemnation of property,

c. The probate of a will,

d. The appointment or qualification of a personal representative, guardian, conservator, committee, or curator,

e. A mill, roadway, ferry, wharf or landing,

f. The right of the Commonwealth, or a county, or municipal corporation to levy tolls or taxes, or

g. The construction of any statute, ordinance, or county proceeding imposing taxes; or

2. By the order of a court refusing a writ of quo warranto or by the final judgment on any such writ; or

3. By a final judgment in any other civil case.

B. Except as provided by Section 17.1-405, any party may present a petition for an appeal to the Supreme Court in any case in chancery wherein there is an interlocutory decree or order:

1. Granting, dissolving or denying an injunction; or
2. Requiring money to be paid or the possession or title of property to be changed; or
3. Adjudicating the principles of a cause.

Code of Virginia: Section 17.1-405

17.1-405. Appellate jurisdiction - Administrative agency, Virginia Workers' Compensation Commission, and domestic relations appeals.

Any aggrieved party may appeal to the Court of Appeals from:

1. Any final decision of a circuit court on appeal from (i) a decision of an administrative agency, or (ii) a grievance hearing decision issued pursuant to Section 2.2-3005;
2. Any final decision of the Virginia Workers' Compensation Commission;
3. Any final judgment, order, or decree of a circuit court involving:

a. Affirmance or annulment of a marriage;
b. Divorce;
c. Custody;
d. Spousal or child support;
e. The control or disposition of a child;
f. Any other domestic relations matter arising under Title 16.1 or Title 20;
g. Adoption under Chapter 10.2 (Section 63.1-219-7 et seq.) of Title 63.1; or
h. A final grievance hearing decision issued pursuant to subsection B of Section 2.2-3007.

4. Any interlocutory decree or order entered in any of the cases listed in the section (i) granting, dissolving, or denying an injunction or (ii) adjudicating the principles of a cause.

Code of Virginia: Section 54.1-3908

54.1-3908. Liability for words used in proceedings concerning conduct. -- No person shall be held liable in any civil action for words written or spoken in any complaint regarding, proceeding concerning, or investigation of, the professional conduct of any member of the Virginia State Bar, unless it is shown that such statements were false and were made willfully and maliciously.

"Appellate Review in Virginia," A Report by the Judiciary Committee of the the Virginia State Bar Association, 1994, 1997, excerpts

1994, Page i

The Judiciary Committee of the Virginia Bar Association has completed a two-year study of the appellate process in Virginia. Our work has been guided by two persuasive points:

1. There is an avalanche of appellate filings in the United States. Virginia is no exception. The number of appellate filings in Virginia is more than 60% higher than when the Court of Appeals of Virginia was founded eight years ago. Although our appellate courts have remained essentially unchanged since that time, the Court has greatly increased its production of opinions since its creation. Yet despite its best efforts, a backlog now seems inevitable. For example, at present, it takes approximately 18 months to resolve a criminal case in Virginia. This time period, which includes both the adjudication of the petition for appeal as well as the time required for final disposition, falls well beyond the American Bar Association Standard and is considered unacceptable by many of those who work within the appellate system. Despite the herculean efforts of judges and staff to

resolve cases in a fair and timely fashion, the current amount of time required to address so important a part of our judicial process raises fundamental questions about the adequacy of our current appellate process.

2. To those who stand before the court, the perception of fairness is as important as the reality. Only Virginia, New Hampshire, and West Virginia provide only discretionary appeal to civil litigants and criminal defendants. The other states, the District of Columbia and the entire federal court system all provide one level of error correction automatically by simply filing notice of an appeal. The discretionary appeal adds another step to the appeal process that may not be the most effective way of insuring timely review of court rulings and may lead to the perception that the exercise of "discretion" is influenced by capacity.

After a great deal of deliberation, survey of opinions and interview with judges and lawyers, we have concluded several points and have developed specific recommendations intended to improve our system of appeal.

Recommendations

The following recommendations are submitted with the highest respect for our Judiciary and the men and women who serve the people of Virginia as our judges and court officials:

First, that current staff needs of the Court of Appeals be funded immediately;

Second, that the Legislature amend Virginia Code Annotated 17.116.01 to allow the Judicial

Council of Virginia to prepare periodic reviews and reports to the Legislature about the size and staffing of the Court of Appeals. This should assure that recommendations for additional judgeships and staff are made in a timely fashion after full investigation, just as the Judicial Council does for circuit court judgeships under Virginia Code Annotated 17-119.1:2. Since the size of the Court of Appeals has not been studied since the Court was created, the current situation should be assessed as soon as possible with annual or biennial reports thereafter;

Third, that all civil cases be made appealable to the Court of Appeals in the first instance by petition as is the case with criminal cases now;

Fourth, that Virginia Code Annotated 17-116.07 be amended to make cases in all subject matters eligible for appeal after action by the Court of Appeals by petition to the Supreme Court, permitting the Supreme Court the maximum ability to deal with the evolving legal issues facing the state, to resolve ambiguities in the law, interpret legislation and set policy;

Fifth, that, over time, the Commonwealth adopt a system whereby appeal to the Court of Appeals shifts from petition to "notice of appeal," which does not require a separate petition for "leave to appeal." This change would assure one level of appellate review; and

Sixth, that the time frame set for this change be one which allows for analysis and development of systems which do not lower the quality of review afforded litigants from that currently

enjoyed, and which allows for the practical necessity of funding both normal growth needs and necessary changes in the appellate system.

1994, Page 41

... If one assumes that appeal is sought in other civil subject matters with the same relative frequency that has characterized domestic relations cases in Virginia, and using the most recent figure of 105,000 civil case closings annually in Virginia at the trial level, there would be approximately 1,000 civil appeals filed under the "of right' system, and the appellate docket of the Court of Appeals would be approximately 3,700 (again, based on 1992 numbers), made up of 2,700 filings in the current mix of cases and 1,000 new civil filings. On these assumptions, a Court of Appeals of 16 judges would be able to keep current at the rate of 225 filings per judge.

We believe that Phase Two of the implementation for appeal of right, in which the management techniques are studied and staffing needs defined more precisely than can be attained in advance is an important part of the process. It will yield much more precise measures of the staffing needs. But we offer the paragraphs above as rough initial guides for discussion purposes. On the assumption that the most accurate guess is that 15 judges would be able to manage the system, the cost of moving to Phase Three (final implementation of appeal of right) would be an additional $600,000 annually [two judgeships and supporting staffs], and the total cost of the shift of all first level appeals to the Court of Appeals (Phases One, Two and Three) would be $1.5 million (a total of five judgeships above the current 10 positions).

1997, Page 2

The structure of the Virginia appellate system nevertheless places challenging responsibilities on the Supreme

Court. Most supreme courts deal almost exclusively with *legal policy* issues such as constitutional and statutory interpretation that have broad significance beyond the specific case at hand. (Criminal capital punishment cases are one exception.) The Virginia Supreme Court, however, also has major *error correction* responsibilities, *i.e.*, the review of cases to determine whether the trial judge made an error that simply prejudiced a party in that particular case. This is a function typically performed in other jurisdictions by three judge panels of intermediate appellate courts.

Specifically, our Supreme Court is the sole avenue of review for civil cases from the circuit courts other than domestic relations cases. This direct civil review function that is predominantly an error correction function is a major burden on Supreme Court resources.

The effect of the direct civil review function is that in Virginia seven Supreme Court Justices perform an error correction function that nationwide generally is performed by three intermediate appellate judges. The direct civil appeal function of the Supreme Court (i) limits the number of appeals from the Court of appeals that may be heard, (ii) likely contributes to the small percentage of such appeals that are heard, (iii) likely underlies the 1994 Bar Survey responses indicating that some areas of the law are not well developed, and (iv) likely underlies the 1994 Bar Survey responses indicating that the Supreme Court is not able to hear all meritorious appeals.